

Board chooses to exercise its discretionary authority to adjudicate the matter on the merits without a remand.

(h) *Applicability of other exceptions to motions to reopen.* Nothing in this section shall be interpreted to preclude or restrict the applicability of any other exception to the motion to reopen provisions of this part as defined in 8 CFR 3.2(c)(3) and 3.23(b).

(i) *Limitations on eligibility for reopening under this section.* This section does not apply to:

(1) Aliens who have departed the United States;

(2) Aliens with a final order of deportation who have illegally returned to the United States; or

(3) Aliens who have not been admitted or paroled.

[66 FR 6445, Jan. 22, 2001; 66 FR 8149, Jan. 29, 2001]

#### § 3.46 Protective orders, sealed submissions in Immigration Courts.

(a) *Authority.* In any immigration or bond proceeding, Immigration Judges may, upon a showing by the Service of a substantial likelihood that specific information submitted under seal or to be submitted under seal will, if disclosed, harm the national security (as defined in section 219(c)(2) of the Act) or law enforcement interests of the United States, issue a protective order barring disclosure of such information.

(b) *Motion by the service.* The Service may at any time after filing a Notice to Appear, or other charging document, file with the Immigration Judge, and serve upon the respondent, a motion for an order to protect specific information it intends to submit or is submitting under seal. The motion shall describe, to the extent practical, the information that the Service seeks to protect from disclosure. The motion shall specify the relief requested in the protective order. The respondent may file a response to the motion within ten days after the motion is served.

(c) *Sealed annex to motion.* In the Service's discretion, the Service may file the specific information as a sealed annex to the motion, which shall not be served upon the respondent. If the Service files a sealed annex, or the Immigration Judge, in his or her discre-

tion, instructs that the information be filed as a sealed annex in order to determine whether to grant or deny the motion, the Immigration Judge shall consider the information only for the purpose of determining whether to grant or deny the motion.

(d) *Due deference.* The Immigration Judge shall give appropriate deference to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit in determining whether the disclosure of information will harm the national security or law enforcement interests of the United States.

(e) *Denied motions.* If the motion is denied, any sealed annex shall be returned to the Service, and the Immigration Judge shall give no weight to such information. The Service may immediately appeal denial of the motion to the Board, which shall have jurisdiction to hear the appeal, by filing a Notice of Appeal and the sealed annex with the Board. The Immigration Judge shall hold any further proceedings in abeyance pending resolution of the appeal by the Board.

(f) *Granted motions.* If the motion is granted, the Immigration Judge shall issue an appropriate protective order.

(1) The Immigration Judge shall ensure that the protective order encompasses such witnesses as the respondent demonstrates are reasonably necessary to the presentation of his case. If necessary, the Immigration Judge may impose the requirements of the protective order on any witness before the Immigration Judge to whom such information may be disclosed.

(2) The protective order may require that the respondent, and his or her attorney or accredited representative, if any:

(i) Not divulge any of the information submitted under the protective order, or any information derived therefrom, to any person or entity, other than authorized personnel of the Executive Office for Immigration Review, the Service, or such other persons approved by the Service or the Immigration Judge;

(ii) When transmitting any information under a protective order, or any information derived therefrom, to the

### § 3.61

### 8 CFR Ch. I (1–1–03 Edition)

Executive Office for Immigration Review or the Service, include a cover sheet identifying the contents of the submission as containing information subject to a protective order under this section;

(iii) Store any information under a protective order, or any information derived therefrom, in a reasonably secure manner, and return all copies of such information to the Service upon completion of proceedings, including judicial review; and

(iv) Such other requirements as the Immigration Judge finds necessary to protect the information from disclosure.

(3) Upon issuance of such protective order, the Service shall serve the respondent with the protective order and the sealed information. A protective order issued under this section shall remain in effect until vacated by the Immigration Judge.

(4) Further review of the protective order before the Board shall only be had pursuant to review of an order of the Immigration Judge resolving all issues of removability and any applications for relief pending in the matter pursuant to 8 CFR 3.1(b). Notwithstanding any other provision of this section, the Immigration Judge shall retain jurisdiction to modify or vacate a protective order upon motion of the Service or the respondent. An Immigration Judge may not grant a motion by the respondent to modify or vacate a protective order until either: the Service files a response to such motion or 10 days after service of such motion on the Service.

(g) *Admissibility as Evidence.* The issuance of a protective order shall not prejudice the respondent's right to challenge the admissibility of the information subject to a protective order. The Immigration Judge may not find the information inadmissible solely because it is subject to a protective order.

(h) *Seal.* Any submission to the Immigration Judge, including any briefs, referring to information subject to a protective order shall be filed under seal. Any information submitted subject to a protective order under this paragraph shall remain under seal as part of the administrative record.

(i) *Administrative enforcement.* If the Service establishes that a respondent, or the respondent's attorney or accredited representative, has disclosed information subject to a protective order, the Immigration Judge shall deny all forms of discretionary relief, except bond, unless the respondent fully cooperates with the Service or other law enforcement agencies in any investigation relating to the noncompliance with the protective order and disclosure of the information; and establishes by clear and convincing evidence either that extraordinary and extremely unusual circumstances exist or that failure to comply with the protective order was beyond the control of the respondent and his or her attorney or accredited representative. Failure to comply with a protective order may also result in the suspension of an attorney's or an accredited representative's privilege of appearing before the Executive Office for Immigration Review or before the Service pursuant to 8 CFR part 3, subpart G.

[67 FR 36802, May 28, 2002]

### Subpart D [Reserved]

### Subpart E—List of Free Legal Services Providers

SOURCE: 62 FR 9073, Feb. 28, 1997, unless otherwise noted.

#### § 3.61 List.

(a) The Chief Immigration Judge shall maintain a current list of organizations and attorneys qualified under this subpart which provide free legal services. This list, which shall be updated not less than quarterly, shall be provided to aliens in immigration proceedings. The Chief Immigration Judge may designate an employee or employees to carry out his or her responsibilities under this subpart. Organizations and attorneys may be included on the list of free legal services providers if they qualify under one of the following categories:

(1) Organizations recognized under § 292.2 of this chapter that meet the qualifications set forth in § 3.62(a) and